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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARCO ANTONIO AISPURO, Defendant and Appellant.	D075378 (Super. Ct. No. RIF1602529)

APPEAL from a judgment of the Superior Court of Riverside County, Eric G. Helgesen, Judge. Reversed in part, affirmed in part and remanded with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Marco Antonio Aispuro of seven counts of arson of a structure or forest land (Pen. Code,[1] § 451, subd. (c); counts 1, 2, 4, 10, 11, 13, 15), and seven counts of arson of property (§ 451, subd. (d); counts 3, 5, 6, 7, 8, 12, 14). The jury found true allegations that each offense was committed within the area of a state of emergency (a drought) proclaimed by the Governor pursuant to Government Code section 8625 within the meaning of Penal Code section 454, subdivision (a)(2) and in connection with count 13, appellant used a device designed to accelerate the fire or delay ignition (§ 451.1, subd. (a)(5)). In a bifurcated proceeding, the trial court found Aispuro had suffered a prior felony conviction for criminal threats (§ 422) within the meaning of the "Three Strikes" law and section 667, subdivision (a), as well as a prior felony conviction for assault by force likely to produce great bodily injury (§ 245, subd. (a)(1)) for which he served a prior prison term (§ 667.5, subd. (b)).

The court sentenced Aispuro to an aggregate determinate prison term of 80 years four months, consisting of 23 years on count 13 (the upper term of nine years, doubled, plus five years for the section 451.1, subdivision (a)(5) enhancement); consecutive four-year eight-month terms (one third the midterm of seven years, doubled) on each of counts 1, 2, 4, 10, 11, and 15; consecutive three-year four-month terms (one-third the midterm of five years, doubled) on each of counts 3, 5, 6, 7, 8, 12, and 14; a consecutive one-year

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1 Undesignated statutory references are to the Penal Code.

enhancement for the prior prison term and five years consecutive for the prior serious felony conviction.

Aispuro contends the circumstantial evidence is insufficient as a matter of law to sustain his arson convictions. He further contends the court erred by imposing consecutive prison terms on counts 6 and 7 (fire Nos. 10 and 11) rather than staying the sentence imposed on count 6 under section 654 because the acts underlying those counts were part of a single indivisible course of conduct.

In supplemental briefing, Aispuro argues that in view of Senate Bill No. 1393 (2017-2018 Reg. Sess.) the matter must be remanded for resentencing to permit the court to consider whether to exercise its newly-granted discretion to strike the five-year prior serious felony enhancement imposed under section 667, subdivision (a) in the interests of justice. As to the latter point, the People concede the new law is likely retroactive to Aispuro's case, but they argue remand is futile and unnecessary because the trial court declined to strike Aispuro's strike prior conviction based on the same conduct, thus making it clear it would not have dismissed the prior serious felony allegation even if it knew it had authority to do so.

We conclude the evidence is insufficient to support Aispuro's conviction in count 12. We otherwise affirm the judgment and remand the matter for resentencing including for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a) enhancement imposed on Aispuro.

FACTUAL AND PROCEDURAL BACKGROUND

On three separate days within the span of 10 days in May 2016, firefighters responded to clusters of fires set in the Homeland area of Riverside County. All of the fires were determined to have been intentionally started, most using an open flame device. The first three fires were in close proximity to each other, with less than one minute of walking distance separating them. With the exception of one fire found on May 15, 2016, all of the fires were set in the early morning hours. Five of the fires had been set on church property. Aispuro, who went by the nickname "Too Hard," lived in Homeland at the time. Aispuro's son had seen Aispuro in the location of the fourth fire shortly after it had been set, and ten days later authorities arrested Aispuro after finding him walking nearby one of the church fires set in the early morning hours. Fresh graffiti reading "2 hard" was found at several of the fire locations. When he was contacted, Aispuro was in possession of a lighter as well as a pair of shoes that were last seen at one of the churches.[2] After Aispuro's arrest, both the "2 hard" graffiti and fires having nearby similar shoe impressions stopped. We recount the evidence as to each of the three days below.

Early Morning of May 10, 2016 (*Counts 1-4*; *Fire Nos. 5-8*)

In the early morning hours of May 10, 2016, firefighters responded to fires set to a small patch of grass (fire No. 6), to a mattress against a backyard shed about a block away (fire No. 5), to a chair inside a metal shed near the intersection of Leon and Queen

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2 The People characterize the lighter as a "working open flame device." But the witness testified only that he tested the lighter by striking its wheel to determine whether it functioned, he did not say the result of his test.

Palm Drive (fire No. 7), and to a pile of vegetation debris in the area of Highway 74 and Naumann Avenue (fire No. 8). The grass and mattress/shed fires were "in the same virtual spot," nearby a concrete drainage ditch. A fire captain estimated that fire Nos. 5, 6 and 7 were all started about the same time, around 1:05 a.m., and that it would take approximately 30 to 45 seconds to walk between them. The vegetation debris fire had been put out by an adjacent resident and was smoldering by the time firefighters reached it. A firefighter estimated that the fourth fire started at approximately 1:30 a.m. Fire Nos. 5, 6 and 7 were determined to have been ignited intentionally, using an open flame device. Fire No. 8 was determined to be arson, but the responding firefighter could not determine what was used to start it. There were no transients or homeless people in the area of that fire.

Aispuro's adult son had notified authorities that morning about fire No. 8 at Highway 74 and Naumann Avenue. Between 2:00 a.m. and 3:00 a.m. he was awakened by barking dogs and saw his father outside the Allen Avenue home where the son was living with his sister and mother, Aispuro's ex-wife. Aispuro was not supposed to be there, so the son chased him away from the property up Naumann Avenue. At that point, the son returned home to put on clean clothes. When he returned to the location where he last saw Aispuro at the corner of Naumann Avenue and Highway 74, he saw a small fire had just been started there. He woke nearby residents and called the fire department. At some point that morning he had also called 911, telling the dispatcher he had seen his father in his backyard. His mother, who had been long separated from Aispuro and told

him numerous times he was not welcome at her home, also saw Aispuro and called 911 dispatchers.

A Cal Fire specialist investigating the four fires was given a field interview card with Aispuro's name on it. He also observed new graffiti in the area on a storm drain, the number "2" and the word "hard" behind it. The specialist had never seen the graffiti before, which appeared fresher than other surrounding graffiti. According to Aispuro's daughter, "Too Hard" was Aispuro's "rap nickname."

Seventh Day Adventist Church and Nearby Fires Discovered on May 10, 2016 (*Counts 5-8*; *Fire Nos. 9-12*)

After about 7:00 that same morning, firefighters were sent to investigate additional fires that had been set on or adjacent to church property in the same area of Homeland as the earlier fires, at the intersection of Highway 74 and Leon Road.

Fire No. 9 was set to a pallet that had been laid against the north side of a classroom building and stuffed with paper. That fire was intentionally set with an open flame device, and had occurred within 12 hours of its discovery. Two other fires had been set to a cardboard box (fire No. 11) and to lattice material (No. 10) located in close proximity to each other on the south side of the main church building. Both of those fires were out and the items cold to the touch by the time investigators responded. An investigator determined those fires were started at approximately 2:00 a.m., and were intentionally caused. Another fire (No. 12) was located in adjoining property at a power pole on the east side of a chain link fence separating the church property from an open field. This fire was also determined to be intentionally started.

Nearby the pallet and also leading back to the power pole, investigators found shoe impressions with a unique triangular or diamond-shaped pattern, an impression that had been observed at other locations. They also found a handheld torch on the east side of the chain link fence in the open field area.

Other Structure Fires Investigated on May 10, 2016 (*Counts 10*, *11*; *Fire Nos. 13 and 14*)

Firefighters were dispatched to two additional fires that day. Fire No. 13 had been set to a pile of debris piled against an exterior of a school district administration storage building. That fire was determined to be intentionally set.

Fire No. 14 had been intentionally set to a storage shed owned by a fence company located by Highway 74 and Juniper Flats Road. Just north of the site behind a block wall, a responding firefighter located shoe print impressions with a similar triangular pattern to those found at other fire locations.

May 15, 2016 Fire (*Count 12*; *Fire No. 15*)

About 6:20 p.m. on May 15, 2016, firefighters responded to fire No. 15 set to a pile of trash against a wall off of Juniper Flats Road about a half mile north of Highway 74. It was a high traffic area, and there were no obvious shoe prints in the dirt. Aispuro was not seen in the area. The firefighters saw new graffiti—the number 2 and the word "hard"—spray painted on the wall behind the fire, as well as on several places on the wall north and south of the fire. The responding fire captain was "pretty confident" that the graffiti had not been there the previous day. It was his impression that the fire was lit to draw attention to the graffiti. He determined the fire was started about 6:15 p.m. and its cause was arson.

May 20, 2016 Fires (*Counts 13-15*; *Fire Nos. 16a, 16b, and 17*)

At about 2:45 or 3:00 in the morning on May 20, 2016, firefighters were dispatched to a fire at a mobile home behind a church on Homeland Avenue (No. 16a). While enroute, one of the officers started looking for individuals in the area who might be watching the fire. For about ten minutes he travelled to several locations, including the fence company where a previous fire had occurred, and eventually saw Aispuro walking northbound from Highway 74 up toward Juniper Flats Road. The officer called Aispuro over. On searching him, the officer found a cigarette lighter and a small pair of brown women's shoes in his waistband, but no other smoking materials such as tobacco or cigars. A colleague photographed the bottom of Aispuro's shoes. The women's shoes in Aispuro's possession were later determined to be left over from a rummage sale on the church property; on the day of the fire they had been in a pile of items inside a six-foot chain link fence near the front gate.

After contacting Aispuro, the officer responded to the church mobile home fire. He and others located shoe impressions nearby that had unique triangular features that could have been made by a shoe similar to Aispuro's. The shoe impressions were pointing south on Homeland Avenue in the direction of the church mobile home fire and stopped outside a gate at the front of the property where the dirt turned into rock.

A fire investigator conducting a perimeter search found a hooded sweatshirt with what appeared to be burn holes on the back and more shoe print impressions in dirt just off the Homeland Avenue property. He also found three additional fires (No. 16b) on the property in some mattresses and box springs propped up under a patio cover for a

detached garage. The investigator determined these fires were intentionally set with an open flame device. He returned to the mobile home fire, which he also determined was started with an open flame device. The investigator also located a nonworking yellow lighter against a chain link fence near the fire location. He believed the shoe print impressions were similar to photographs of a shoe that a colleague showed him.

A few minutes after being called out to the church fires, firefighters were called out and responded to another intentionally set fire (No. 17) to a room addition of an unoccupied mobile home on Neer Avenue. The fire had two points of origin. An investigator found and photographed shoe print impressions outside the fire area on the opposite side of Neer Avenue west of the structure. According to the investigator, the shoe impressions had the same or similar impression as the photograph he had taken earlier of the shoes Aispuro was wearing on May 20, 2016. He also felt the approximate size of the shoe impression was similar to that of Aispuro's shoes. The impressions showed the person was moving east to west, and northwest up a trail off at an angle from Neer Avenue. The impressions stopped at the asphalt of Highway 74. While following the shoe impressions, the investigator found some new black graffiti on a wall reading "2 hard." The firefighter testified that after May 20, 2016, he had not responded to fires in the Homeland area with similar shoe impressions, nor had he seen any more tagging of "2 hard" in the Homeland area. Aispuro was arrested on May 20, 2016.

Expert Witness Testimony

A criminalist with experience in shoe impression comparisons testified that in July 2016 he received four photographs (labelled A, B, C & D) of shoe impressions from one

of the May 20, 2016 fires (No. 16), as well as a pair of size 9.5 World Industry shoes. He made test impressions with powder and dirt, then using those as aids, compared the shoes with the printed photographs. He concluded that the right shoe could have made the impression shown in photograph A, but it likely made the impression shown in photograph C as they corresponded in design of horizontal lines and triangle elements; he explained that given the nature of the dirt in Riverside County it was not uncommon to be unable to make a more definitive statement. He concluded the left shoe likely made the impression in photograph B, and it could have made the impression shown in photograph D. He further concluded as to one of the church fires (No. 9; count 5) that the right shoe could have made the impression found there. He concluded that the right shoe could have made the impression found from one of the May 10, 2016 structure fires (No. 14; count 11). However, the expert could not say when any of the shoe impressions were placed in the dirt, and he conceded that as to some of the impressions (found at fire Nos. 9 and 14), they could have been made by another shoe with the same design and size, including slightly smaller or larger sizes.

Other Trial Testimony

In May 2016, Aispuro was living in a house on Juniper Flats Road with his daughter and her grandparents, his daughter's aunt and uncle, and two of her cousins. The grandfather kept spray paint and other types of paint in a shed on the property. The house where Aispuro was living was about a 15- or 20-minute walk from his ex-wife's house. According to Aispuro's daughter, he sometimes visited another person's house on

Neer Avenue. She explained that Aispuro does not drive, but walks frequently in the Homeland area.

Defense Case

Aispuro's mother and aunt testified that midday on May 9, 2016, his mother dropped him off at his aunt's house in San Jacinto, where he spent the night. The next day, his mother and sister left at about 9:00 a.m. or 9:30 a.m. and returned to the aunt's house where Aispuro was present. After breakfast, he and other family members attended a family gathering. Aispuro's mother testified she had never known him to go by the nickname "2 Hard."

DISCUSSION

I. *Sufficiency of the Evidence*

Aispuro contends the evidence is insufficient as a matter of law to sustain all of his arson convictions. He maintains his proximity to the fire locations does not give rise to a reasonable, credible inference that he started the fires because he lived and had family in the area, and the shoe print and graffiti evidence only possibly placed him in the area of certain fires (Nos. 6, 9, 12 and 14-17), which is insufficient to prove he started them. Aispuro makes a series of more specific arguments, which we address below.

A. *Standard of Review*

Our review standard is settled: On a challenge to the sufficiency of evidence for jury findings, we are not required to ask whether we believe the trial evidence established

guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Rather, we review the entire record and evidence in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Rivera* (2019) 7 Cal.5th 306, 323; *People v. Dalton* (2019) 7 Cal.5th 166, 244.) We must " ' "presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Dalton*, at p. 244; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) " 'It is not our function to reweigh the evidence, reappraise the credibility of witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact.' " (*People v. Casarez* (2012) 203 Cal.App.4th 1173, 1179.)

" 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.' " (*People v. Rivera*, *supra*, 7 Cal.5th at p. 324; *People v. Westerfield* (2019) 6 Cal.5th 632, 713.) Thus, even where the evidence is circumstantial, we must accept logical inferences that the finder of fact might have drawn from that evidence. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1426.)

Under the substantial evidence standard, " '[i]f the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*People v. Westerfield*, *supra*, 6 Cal.5th at p. 713; *People v. Shamblin* (2015) 236 Cal.App.4th 1, 9.) That is, " ' " '[a]n appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded

otherwise.' " ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) " 'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' " (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

B. *Analysis as to Counts 1-8, 10-11, 13-15* (*Fire Nos. 5-8, 9-14, 16-17*)

The broad underpinning of Aispuro's arguments is that the jury's verdicts are based only on speculative inferences amounting to " ' "speculation as to probabilities" ' " (see *People v. Davis* (2013) 57 Cal.4th 353, 360; *People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544) or mere suspicion, which is an insufficient basis for an inference of fact. According to Aispuro, a reasonable factfinder could not logically draw the inferences that the jury drew in this case so as to deem the People's evidence proof beyond a reasonable doubt that he started these fires.[3] To succeed in this claim, Aispuro must establish that "no rational jury could have concluded as it did—it does not matter that 'the evidence could reasonably be reconciled with a finding of innocence . . . .' " (*People v. Shamblin*, *supra*, 236 Cal.App.4th at p. 9.)

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3 "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned . . . any structure, forest land, or property." (§ 451.) Arson requires only a general criminal intent; "the specific intent to set fire to or burn or cause to be burned the relevant structure or forest land is not an element of arson." (*People v. Atkins* (2001) 25 Cal.4th 76, 84.) Aispuro challenges only the evidence as to his identity as the arsonist; he does not argue that even if he were the person who set the fire, that the evidence is insufficient to sustain the state of mind necessary to support an arson conviction, that is, whether his actions were willful or intentional and malicious. (See *id*. at p. 85, quoting §§ 450, subd. (e), 7, subd. (4) [explaining meaning of terms "maliciously" and "willfully" for purposes of arson statute].)

With the exception of one count that we discuss further below, we agree with the People that Aispuro has merely invited this court to reweigh the evidence to arrive at different inferences than those reached by the jury. Substantial evidence review does not involve asking whether substantial evidence supports contrary inferences. (See *People v. Saterfield* (1967) 65 Cal.2d 752, 759.) Aispuro will not prevail by merely summarizing the circumstances that support a finding in his favor without also showing that the jury's contrary finding cannot reasonably be inferred from the evidence. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053-1054.)

Though the circumstantial evidence must be viewed in totality, Aispuro makes somewhat isolated arguments in his substantial evidence challenge. First, Aispuro points out there was no direct evidence he caused the fires or burning of any property. There is no authority requiring the prosecution to present direct evidence that Aispuro started the fires; to the contrary, "[c]ircumstantial evidence may be relied upon to establish culpability" for arson. (*People v. Belton* (1980) 105 Cal.App.3d 376, 379-380.) Arson is generally "committed in stealth, without warning and *often under the cloak* of darkness," so that "perpetrators of such clandestine acts frequently escape detection by human eye." (*People v. Andrews* (1965) 234 Cal.App.2d 69, 75.) "[T]he very nature of the crime of arson ordinarily dictates that the evidence will be circumstantial." (*People v. Beagle* (1972) 6 Cal.3d 441, 449, abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190-1191.) And such circumstantial evidence is as sufficient as direct evidence to support a conviction. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) "Consequently, the lack of an eyewitness placing defendant at the scene or other direct evidence to

establish his guilt does not render the jury's verdict of guilty of arson constitutionally deficient." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1010, citing *People v. Maler* (1972) 23 Cal.App.3d 973, 983.)

Aispuro next points out he was fully cooperative with authorities on May 20, 2016, and thus there was no evidence of consciousness of guilt. But consciousness of guilt is not an element of the crime of arson. (See *People v. Atkins*, *supra*, 25 Cal.4th at pp. 84-86 [describing statutory elements].) In any event, evidence that Aispuro did not flee when he was approached by fire officials on May 20, 2016, but rather followed the investigator's directions and answered his questions, does not invalidate or rebut the other circumstantial evidence described below tying him to the fires. Aispuro further argues the location of his arrest was not incriminatory because he lived in the same area, and officers acknowledged he could have been walking home. The jury, however, could reasonably reach contrary conclusions by the fact Aispuro was detained close to where fires had been found that morning in possession of a lighter and shoes from one of the church properties. Such evidence tended to show he had ready access to the areas where the fires started and the opportunity to set them. That he lived in the area permits another reasonable inference that the jury could have, but did not, draw (that he was innocently walking to or from his house), and it is not our role to reject the logical inferences the jury in fact drew to establish Aispuro's guilt.

Aispuro additionally points to pieces of evidence tending to show his innocence: He argues he never admitted to setting the fires; he did not have any soot or burn marks on his hands or face, and while an officer testified his sweatshirt had some burn marks on

the back, he also testified it was possible they were not burn marks; he was not in possession of any flammable liquid or fire starting material with the exception of a small cigarette lighter, which was not incriminating because he had a smoking habit; his walking in the neighborhood at 3:00 in the morning was not unusual given the many homeless people in the Homeland area and others out late at night; and the area of his arrest was a high traffic area with homeless people around at all hours of the day. As we have stated, in our substantial evidence review, we focus on evidence supporting the jury's verdicts of guilt; as long as that evidence is sufficient, reversal is not warranted by other evidence or inferences tending to establish Aispuro's innocence. (*People v. Westerfield*, *supra*, 6 Cal.5th at p. 713; *People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.)

Aispuro contends the shoe print evidence cannot sustain the verdicts because witnesses acknowledged his shoes were not unique, the prints could have been left for weeks, they could have been made by shoes similar to his own or a different shoe, and they could have been left for an entirely innocent reason. He recounts cross-examination testimony of some witnesses that they could not say how common Aispuro's shoe brand was, when the shoe prints were made in the dirt, or whether a print for sure matched a particular shoe. Aispuro also points out that there were no shoe prints at the location of fire Nos. 5-8, 10-11, 13 and 15 (counts 1-4, 6-7, 10 and 12) and the shoe print evidence could not be used to support those convictions.

Aispuro misstates some of the evidence as to the uniqueness or prevalence of his shoes. The witnesses did not testify that his shoes "were not determined to be unique" as

Aispuro asserts, they were unable to say how prevalent the *particular brand* was.[4] Other witnesses including the criminalist testified about the unique *features* of the shoe prints—the triangular shapes and horizontal lines crossing the soles—and how the same elements were present on the bottom of Aispuro's shoes. That the witnesses had no information about the prevalence of Aispuro's brand of shoe did not prevent the jury from concluding that the similar shoe prints at the scene of the fires put Aispuro in that location or make such a finding unsupported.

Further, Aispuro's attacks on the shoe print evidence would have us improperly reassess the credibility and weight of the witness and expert testimony regarding the similarities between the shoes Aispuro was wearing upon his arrest, and the shoe prints found at various fire locations. As stated, witnesses testified that the impressions had unique and similar features to the sole pattern of Aispuro's shoes, and the expert testified that Aispuro's shoes either likely or could have made the prints, permitting the jury to reasonably infer that Aispuro's shoes did in fact make the prints, placing him at or near the areas where the fires were set. That the witnesses could not say precisely *when* the shoe impressions were made means that the jury could have reached a different conclusion pointing to Aispuro's innocence, but such testimony did not preclude the jury from concluding otherwise. That is, the jury could reasonably conclude that the fact

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[4] At one of Aispuro's citations to the evidence, a firefighter witness answered "No" to the question: "As part of your investigation in this case, were you able to gather any information about how common this particular brand of shoes is?" Another witness testified that he did not receive training and he did not have experience into how common Aispuro's shoe brand was, and agreed it "could be one of the most common shoes in the world, *you just don't know*?" (Italics added.)

responding firefighters found Aispuro's shoe prints in the dirt, which as a matter of common knowledge can be easily moved, blown, or overridden by cars or other people walking across it, put Aispuro at the location of the fires at or about the time they occurred.

Concededly, shoe prints similar to Aispuro's were not found at the precise spot of every fire, or even at all at some of the fire locations. Aispuro's argument that there were no shoe prints found at the location of fire Nos. 5-8, 10-11 and 13 ignores evidence that many of these fires were clustered around and found close in time to each other, or there was other evidence linking Aispuro to the fire, namely, his presence at the scene in the early morning hours. Shoe prints were found leading between the pallet and power pole at the location of the cluster of fire Nos. 9-12 (the church and power pole fires); shoe prints were found at fire No. 14 (the fence company property), which was a few hundred feet away from the school district property of fire No. 13; and shoe prints were found just off both properties involved in the clustered May 20, 2016 fires, Nos. 16 and 17 at Homeland Avenue and Neer Avenue, which are connecting perpendicular streets. The fact shoe prints were not located at fire Nos. 5 through 8 does not require reversal of the jury's verdict, since Aispuro's son placed Aispuro at the location of the last of those cluster of fires on the morning they occurred, and fresh graffiti with Aispuro's moniker was located nearby them.

Finally, Aispuro argues the graffiti evidence gives rise to only speculative inferences because a witness testified graffiti was common in the Homeland area, the "2 hard" graffiti was only seen at the "exact location" of one fire (count 12; fire No. 15), and

there was no evidence the graffiti was placed there when the fires were started. Aispuro takes too narrow a view of the evidence. For the majority of the fires, the graffiti evidence is one component of multiple pieces of evidence putting Aispuro at the location of the other fires at the time they were occurring, permitting the jury to reach a reasonable inference that he set the clustered fires. Fresh graffiti of Aispuro's moniker was located at or near fire Nos. 5 through 8, where Aispuro was placed in the early morning house by his son. The same graffiti was seen by investigators following Aispuro's shoe impressions at the May 20, 2016 fires (Nos. 16a, 16b and 17), and the women's shoes in Aispuro's possession were last seen on church property the day of the fire, allowing the jury to conclude he was present on church property later that same day. The graffiti stopped after Aispuro's arrest. The graffiti evidence, combined with the other evidence, permitted the jury to infer Aispuro's guilt as to those counts.

C. *Analysis as to Count 12* (*Fire No. 15*)

The sole exception to the conclusions we have reached above is as to count 12, fire No. 15, as to which the only link to Aispuro was the presence of relatively fresh graffiti with his moniker, "2 hard." Fire No. 15 was not set in the early morning hours like the other fires, and there is no other evidence—either someone seeing him in the area, or shoe print impressions similar to his shoes—putting Aispuro at the scene at or about that time. The responding firefighter could not say whether the graffiti had been there two hours or eight hours, and there is no other evidence suggesting when the graffiti had been placed there other than it was not present the previous day.

" 'Whether a particular inference can be drawn from the evidence is question of law.' [Citation.] ' "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." [Citation.] However, "[a] reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " ' " (*People v. Johnson* (2019) 32 Cal.App.5th 26, 58, quoting in part *People v. Davis*, *supra*, 57 Cal.4th at p. 360.) We believe it is too speculative an inference to conclude that Aispuro was the perpetrator of fire No. 15 where there were no similar shoe prints tying him to the scene or any indication he was present there, other than graffiti that appeared to firefighters to be fairly new and testimony by one that it was his impression the fire was set to draw attention to the graffiti. With only the graffiti evidence, the jury had to rely on suspicion or supposition as to the probability that Aispuro was present at the location at the time of the fire. Because there is insufficient evidence that Aispuro committed count 12, that conviction must be reversed.

II. *Application of Section 654 to Fire Nos. 10 and 11* (*Counts 6 and 7*)

Aispuro contends the trial court erred by imposing a consecutive prison term for fire No. 10 (count 6); that the court should have stayed that sentence under section 654. He maintains the evidence as to fire Nos. 10 and 11 (counts 6 and 7)—set to the cardboard box and lattice material on church premises—shows they were burned at the same time and located next to each other, and thus while the burning of these items was

"consistent with two acts," they "were both part of a single, indivisible course of conduct" to burn church property, requiring that the count 6 sentence be stayed under section 654. According to Aispuro, there is no substantial evidence to support the trial court's implied finding that the two crimes involved multiple intents and objectives.[5]

A. *Legal Principles and Standard of Review*

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." The section bars imposition of multiple punishments where one act or an indivisible course of conduct violates more than one statute. (*People v. Correa* (2012) 54 Cal.4th 331, 336-337, 340-341; *People v. Perez* (1979) 23 Cal.3d 545, 551.) The purpose of this protection is to ensure that the defendant's punishment is commensurate with his criminal culpability. (*People v. Capistrano* (2014) 59 Cal.4th 830, 886.)

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several

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[5] Though Aispuro did not expressly object on section 654 grounds in the trial court, a sentence imposed in contravention of that statute is unauthorized, and the error may be raised on appeal in the absence of an objection. (*People v. Kelly* (2018) 28 Cal.App.5th 886, 903, citing *People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Leonard* (2014) 228 Cal.App.4th 465, 498.)

acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives. [Citations.] At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. [Citation.] When those facts are undisputed . . . the application of section 654 raises a question of law we review de novo." (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312.)

If the pertinent facts are in dispute, "[i]ntent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) The court's implicit or express determination in that respect will be upheld on appeal if supported by substantial evidence. (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 886 & fn. 14 [appellate court may affirm the trial court's ruling, if supported by substantial evidence, on any valid ground], overruled on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 104; *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005.) We review the court's determination in the light most favorable to the People and presume the existence of every fact the court could reasonably deduce from the evidence. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378; *People v. Vang* (2010) 184 Cal.App.4th 912, 915-916.)

B. *Analysis*

With respect to fire Nos. 10 and 11, the People presented testimony from fire captain Craig Knight and Keith Dietz, a fire captain specialist assigned to a unit at Riverside County Cal Fire. Captain Knight responded to the church fire on May 10, 2016, and conducted a preliminary fire investigation. He described two separate burn marks to the bottom and top of the lattice and charring to the flap of the cardboard box. He eventually turned the investigation over to fire captain specialist Dietz. Fire captain Dietz testified that the fires were in close proximity to one another, at the south part of the main church.

Aispuro concedes that the evidence is consistent with two acts, and we agree. Whether Aispuro completed both arsons through a single physical act "depends on whether some action [he] is charged with having taken separately completes the actus reus for each of the relevant criminal offenses." (*People v. Corpening*, *supra*, 2 Cal.5th at p. 313.) Neither fire captain witness testified that the two fires were both caused by a single ignition point. (Compare *People v. Fry* (1993) 19 Cal.App.4th 1334, 1340 [section 654 prohibited separate punishment for arson of a carport and arson of a vehicle inside it because "[b]oth resulted from a single act," the ignition of the vehicle, "and, in light of the trial court's finding that defendant did not intend to burn the carport, both shared the same criminal objective"].) The testimony of both Knight and Dietz as to the burn marks on the different items of property thus constitutes substantial evidence that Aispuro committed two separate physical acts of arson, one that resulted in the ignition of the cardboard box and one that resulted in the ignition of the lattice material.

We cannot agree that the record is devoid of substantial evidence to support the trial court's implied finding that section 654 did not apply to the two acts. Even if we were to agree with Aispuro that his acts were incident to one objective to burn church property, his course of conduct "may 'give rise to multiple violations and punishment' if it is 'divisible in time.' [Citation.] '[A] course of conduct divisible in time, though directed to one objective, may give rise to multiple convictions and multiple punishment "where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." ' " (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 424-425.) Here, the fact Aispuro set fire to two separate objects, even despite their close proximity to one another, permitted the court to reasonably infer that he had time to reflect after setting the first fire and renew his intent before committing his next act. (Accord, *People v. Louie* (2012) 203 Cal.App.4th 388, 399.) Aispuro suggests the circumstances are like *People v. Latimer* (1993) 5 Cal.4th 1203, where a defendant physically and sexually assaulted a victim soon after kidnapping her, requiring the court to conclude the kidnapping was done to facilitate the assault, barring additional punishment for the kidnapping. (*Id*. at pp. 1205-1206, 1216.) Here, there is no evidence showing or permitting an inference that one arson was committed so as to facilitate the other. *Latimer* is inapposite.

III. *Senate Bill No. 1393*

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, on January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to

allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; see §§ 667, subd. (a)(1), 1385, subd. (b).) Under the version of these statutes in effect at the time Aispuro was sentenced, the court did not possess such discretion.

Aispuro contends that Senate Bill No. 1393 applies retroactively, and therefore, we must remand this matter for resentencing under the bill. The People concede that Senate Bill No. 1393 likely applies retroactively if Aispuro's judgment is not yet final. However, pointing to the trial court's refusal to strike Aispuro's prior strike conviction, they argue that remand is futile and unnecessary because in doing so the court "clearly indicated it would *not* be in the furtherance of justice to reduce [Aispuro's] punishment" and thus it would not have struck the serious felony prior that is based on the same conduct as Aispuro's strike prior conviction.[6] In reply, Aispuro points out the trial court declined to strike the prior strike under the Three Strikes law, but it did not address whether it would have struck the conviction under section 667, subdivision (a) because it correctly understood it had no discretion to do so. Aispuro argues the record does not show the court clearly indicated it would not have in any event stricken the five-year enhancement under section 667, subdivision (a) if it knew it had such discretion.

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6 The entirety of the court's ruling following argument on Aispuro's motion to strike his prior conviction was as follows: "Looking at the factors of this case as well as the law on the three strikes, which does give the Court authority to strike priors when it finds facts expressly articulated to justify that being done, in this particular case I do not find those factors to be present and I would deny the striking of the strike prior."

We agree Senate Bill No. 1393 applies retroactively to Aispuro's judgment, which was not yet final as of January 1, 2019. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745; see *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) As for the People's futility argument, we are not persuaded. A trial court must exercise "informed discretion" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391) when sentencing a defendant, and thus if the court proceeds on the assumption that it lacks discretion, remand for resentencing is required unless the record "clearly indicate[s]" it would have reached the same conclusion had it been aware of its discretionary powers. (*Ibid.*; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [stating in the context of Senate Bill No. 620, " '[w]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing' " but "if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required" ' "]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 [same; following *McDaniels* and stating "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence"].)

We decline to say that here, remand will be an " ' "idle act," ' " notwithstanding the trial court's sentencing decision on Aispuro's motion to strike his prior strike conviction, because Aispuro will need to be resentenced in light of our reversal of count 12. Even if that were not the case, because the trial court imposed middle terms to which it added the five-year enhancement under section 667, subdivision (a) and its comments did not

unequivocally rule out the possibility of a lower sentence (compare *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [court's "pointed" comment that " '[t]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence . . . .' " showed there was no possibility that on remand it would exercise its discretion to strike the enhancement]), it is our view that the court's denial of Aispuro's motion to strike his conviction is not sufficient to demonstrate that it would be futile to remand the case for the court to exercise its newly provided discretion. Thus, the trial court should consider on remand whether to dismiss or strike the five-year section 667, subdivision (a) enhancement imposed on Aispuro. We express no opinion about how the court should exercise its discretion.

DISPOSITION

We affirm the convictions against Aispuro in counts 1-8, 10-11, and 13-15. We reverse for insufficient evidence the arson conviction against Aispuro in count 12. The matter is remanded to the trial court for resentencing consistent with this opinion, including for the court to exercise its discretion whether to strike or dismiss Aispuro's five-year prior serious felony enhancement under Penal Code section 667, subdivision (a). Upon resentencing, the trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.